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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 440

CLIVE MICHAEL BOUTILIER,
Petitioner,

v.

THE IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND JUDICIAL CIRCUIT

REPLY BRIEF FOR PETITIONER

BLANCH FREEDMAN
299 Broadway
New York City, 10007

ROBERT BROWN
305 Broadway
New York City, 10007

Attorneys for Petitioner

On the Brief
David M. Freedman
Blanch Freedman

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Petitioner, at the outset of his brief,[1] pointed out that the legal and other problems inherent in this case stem from the confusion that has resulted from administering the statute as applying to the behavior of aliens instead of to their medical condition, as the statute reads. In its brief, the respondent has not answered, discussed or even commented on this dichotomy. Petitioner, there-

[1] p. 10

fore, repeats and reiterates this postulate. Unless this basic error is recognized and corrected, the administration of the statute, *even as amended*, leads to a morass from which there is no extrication.[2]

POINT I

The Statute Relates to the Condition of the Alien

Petitioner would stress that the statute as enacted is neither vague nor uncertain. While the term "psychopathic personality" is considered imprecise,[3] the Public Health Service could describe the symptoms which it considered fell within that description. There is nothing therefore, on the face of the statute that gives rise to the many questions dealt with in the briefs presented The problems have arisen solely from the fact that the statute has been administratively re-written. Petitioner should be able to rest on the clear and admitted fact[4] that he was never shown to have been an alien excludable under the language of the law as it reads to the lawyer or the layman. It provides that persons "*afflicted* with psychopathic personality" be excluded. (Italics ours). If words are to have any meaning, then being "afflicted" can relate only to a condition, physical or psychiatric, which may be manifested in different ways, including sexual behavior. But it necessarily implies a

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[2] It was pointed out in petitioner's brief (p. 10) how the court below spoke of characteristics and behavior as if they were interchangeable. The same is true of respondent in its brief. While the tenor of the entire brief is that the statute excludes persons because of homosexual behavior, in order to justify use of post-entry conduct, it finds it necessary to state (p. 16) "Here as in *Fleuti*, the statutory ground for expulsion was not the alien's conduct after entry, but his *condition* at the time of entry". (Italics ours). This is repeated in other places.

[3] Res. Br., p. 23.

[4] Respondent states "They (administrative authorities) did not find that he was psychopathic in a clinical sense." (Res. Br., p. 19).

condition that is medically ascertained — not by a rubber-stamp certification as was done here, but by a professional examination.

The petitioner has basically argued from the initial hearing before the respondent up to the present time that the statute be applied to him as it reads — namely, on the determination of whether he is "afflicted with psychopathic personality". That means applying the statute to his physical or psychiatric condition.

He has been side-tracked from this position, by the insistence of respondent — unfortunately supported by some court decisions[5] — that the statute does not mean what it purports to say. Respondent claims — and it has so administered the statute that the words "afflicted with psychopathic personality" means a homosexual, and a homosexual is to it anyone who has engaged in homosexual acts. Respondent says[6] it does not consider the statutory term a "euphemism" for homosexual as petitioner has charged; it considers the term merely to *include* homosexuals. However, it is hard put to suggest a single other instance to which it has been applied or might be applied by respondent.[7]

This raises the initial dilemma brought about by substituting this administrative interpretation for the congressional mandate, because it substitutes behavior or conduct for condition. The statute as it reads requires a medical examination and finding of a *condition*, physical or psychiatric. The administrative interpretation has no guide lines, no boundaries, no test of any kind. Respondent grudgingly admits the problem thus created, saying, "There may indeed be cases where it is difficult to determine whether — and in precisely what sense —

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[5] Res. Br., p. 19, note 9.

[6] Ibid.

[7] Res. Br., p. 36.

an individual should be deemed homosexual within the intent of the statute." [8]

The difficulty stems precisely from enforcing the statute as relating to sexual behavior. That difficulty does not exist when the statute is enforced as it reads, for then homosexuality, that is medically a pathological condition, is reached by the statute.

Respondent operates on the assumption that it is talking about condition when it speaks of petitioner as a "homosexual", as for instance, when it heads Point II of its brief (p. 31) "THE 'PSYCHOPATHIC PERSONALITY' PROVISION IS NOT VOID FOR VAGUENESS AS APPLIED TO HOMOSEXUALS". But labeling one a "homosexual" is not describing a condition — it is merely misusing a word. It has been pointed out in Petitioner's brief (p. 10) that medical science today does not speak of homosexual but only of homosexual behavior or conduct. In this connection, it is of interest to note that the United States Civil Service Commission is applying this scientific criterion in evaluating applicants for government employment. In a communication addressed to The Mattachine Society of Washington, dated February 25, 1966, it stated in part:

> "We do not subscribe to the view, which indeed is the rock upon which the Mattachine Society is founded, that 'homosexual' is a proper metonym for an individual. Rather we consider the term 'homosexual' to be properly used as an adjective to describe the nature of overt relations or conduct. . . .
>
> "In the light of these pervading requirements it is upon overt conduct that the Commission policy operates, not upon spurious classification of individuals."

The respondent's administration of the statute has been predicated upon this "spurious classification". As

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[8] Res. Br., p. 36, note 21.

so construed and administered, the statute provided no adequate standard. Even if, as respondent contends, "Congress intended to bar homosexuals from immigration", since such a category is not really definable, it provides no standard.[9] In this respect, too, it would fall within the holding in *Mahler v. Eby*, 264 U.S. 32, 40, that it constituted an invalid delegation of legislative power to an executive officer.

Respondent says: "nor is it material whether the statutory phrase be considered a medical term — or a legal one . . ."[10] — that it is the intent of Congress that controls. As we have suggested, it is most material, because if it is a medical term, it can apply only to a medical condition, and it is arrant nonsense to say it is a medical term but it is not meant to be applied as such.[11] If not, then why was it used? Was there such a paucity of language at the disposal of Congress to say what it meant?

POINT II

On the Question of Legislative History

Respondent has attempted to justify its administrative interpretation by urging that while Congress did not say it, respondent knows that its interpretation of the statute is what Congress intended to say. In other words, while Congress enacted legislation ostensibly dealing with the condition of aliens, it really meant to deal with their behavior patterns. The basis of this argument is the legislative history behind the enactment of the 1952 law. But resort to legislative history is necessary or

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[9] Res. Br., p. 36-37, note 21.

[10] Res. Br., p. 36.

[11] Respondent actually acknowledges that it is a medical term (Res. Br., p. 19, note 9) saying "The category (psychopathic personality) clearly encompasses *other medical* types as well." (Italics ours).

meaningful only if the statute on its face is vague or ambiguous. This is not the case here. As stated above, if the statute is enforced as it reads, petitioner does not challenge it as "vague" or unconstitutional. It is the re-writing of the statute by respondent that is objected to and that raises questions of vagueness and impossibility of proper administration.[12]

When the court does resort to legislative history it is to *clarify* statutory language — not to create new and different provisions that Congress did not adopt. For example, in the recent case of *Immigration & Naturalization Service v. Errico*, 385 U.S. 214, this court reviewed the legislative history of Section 241(f) of the same act. That provision bars the deportation of an alien who gained permanent admission to the United States through the perpetration of a fraud, if the alien is an immediate relative of a citizen. The court examined the legislative history — not to make the term "fraud" mean something not intrinsically fraudulent — but to determine whether the *proved acts of fraud* in that case were the type of fraudulent acts within the legislative intent. In the instant case, the respondent's use of legislative history is not to determine whether a *proved medical condition of psychopathic personality* was intended to be embraced by the statute. On the contrary, "legislative intent" is being used to escape its burden of proving that the homosexual acts of the petitioner medically constituted a psychopathic personality.

Moreover, the legislative history does not bear out the respondent's contention, as has been pointed out in detail in petitioner's brief (Point II, pp. 21-28).

The respondent's contention that the term "psychopathic personality" includes all homosexual acts or behavior rests, exclusively, upon how a committee of nine Senators construed a medical report of the Public Health

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[12] Pet. Br., p. 11, note 3.

Service, dated May 15, 1951 (Res. Br., pp. 21-22). It is not true as indicated by respondent that House Judiciary Committee Report [#1365] accompanying the adopted House bill (H.R. 5678) "referred to the advice of the Public Health Service mentioned in * * * Senate Report #1137". (Res. Br., p. 22). The fact is that the House Judiciary Committee in its report did not interpret or summarize for Congress the contents of the Public Health Service Report; instead, it set out verbatim the full text of that Report, leaving it to speak for itself.

A normal reading of that report leads naturally to the conclusion reached by Judge Leonard Moore in his dissent below that "Congress contemplated an inquiry in each case, to be performed by skilled psychiatrists, into whether the homosexual activity of a given individual amounted to such a 'disorder of the personality' as to constitute 'psychopathic personality' " (R. 47).

Respondent concedes that the Public Health Service Report did not explicitly advise that the term psychopathic personality automatically embraced all homosexual conduct (Res. Br., p. 25), but argues that it intended to convey to Congress the impression that it did. In support of this thesis, it notes (Res. Br., p. 27, note 13) that "Congress was definitely informed, for example, that 'ordinarily, persons suffering from disturbances in sexuality are included within the classification of' psychopathic personality with pathological sexuality' and that *this classification will specify such types of pathologic behavior as homosexuality or sex perversion* * * * '". This is set forth and indeed emphasized by respondent without a moment's attention being paid to the recurrent use of the term "pathologic". It is indeed treated as if it did not appear in the text at all, given no meaning whatsoever, whereas, as Judge Moore pointed out, the report was referring to *pathologic* sexuality and *pathologic* behavior that manifested itself in homosexuality or sex perversion. The significant words are the *pathologic condition.*

This is distorted by respondent into its belief that the Public Health Service *believed* that the clause "aliens afflicted with 'psychopathic personality'" would effectively exclude all persons who have engaged in homosexual practices from entry (Res. Br., p. 25). How speculative may the respondent get? Clearly, such conjecturing is unwarranted. Particularly when the history discloses that Congress, when confronted with the task of legislating about sexual behavior decided and chose to make excludable such sexual behavior that medically could be classified as *pathologic* — and none other.

This logically explains why the proposal of the House Bill of 1951 — H.R. 2379 — making excludable "aliens who are homosexuals or sex perverts" was eliminated from the final enactment of the law.

However, regardless of what respondent insists was the Congressional intent when it enacted Sec. 212(a)(4) in the 1952 Act, Congress itself has decided its language was not free from doubt and hence amended it in 1965[13] in order to resolve any doubt. So that the provision as it applied to petitioner, to wit:

> (4) Aliens afflicated with psychopathic personality, epilepsy, or a mental defect

has been replaced by

> (4) Aliens affliected with psychopathic personality, or sexual deviation, or a mental defect.

It is the position of respondent that Congress changed nothing by this change of language; that these two sentences mean the same thing and that they apply equally to the same persons (except that the term epilepsy has been removed from the section).

If these two provisions mean the same thing, then indeed language is meaningless. If, as respondent contends, the words "afflicted with psychopathic personal-

[13] Sec. 15(b) of the Act of October 3, 1965, 79 Stat. 919.

ity" at least include [14] sexual deviates, then the use of that term as a separate category in the amended section is obviously a superfluous redundance.

The position of the respondent is untenable. The amended section is a recognition by the Congress in 1965 that whatever the intent had been when the law was enacted in 1952, the language then used did not express what has now been enacted by this Congress.[15] Here as in *Cope v. Cope*, 137 U.S. 682, cited by respondent, the later act only helps to make clear that what it now includes was omitted if not excluded in the earlier one.

POINT III

On the Issue of Vagueness

a.

The amendment of Sec. 212(a)(4) by Congress in 1965 should dispose of any doubt that the respondent's interpretation of the statute rendered it vague.

Respondent points to the 1965 amendment as proof of Congressional intendment when the statute was enacted in 1952. This ignores the very reason for the amendment, which it quotes from the Senate report (No. 748, 89th Cong., 1st Sess.) as being "to resolve any doubt" (Res. Br., p. 29). The amendment thereby also resolved any doubt that the statute as construed and administered by the respondent had rendered it vague and uncertain. For what is doubt if not lack of clarity? It is so defined in Funk & Wagnalls College Standard Dictionary:

"Lack of certain knowledge; uncertainty",

and doubtful is defined in part as

"Indistinct; vague; ambiguous".

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[14] See Res. Br., p. 19, note 9.

[15] See Wong Kam Wo v. Dulles, 236 F.2d 622.

So that despite the position taken by the respondent on this argument, Congress itself has conceded that the statute as it had been administered by respondent was vague. It can hardly be denied that whatever construction may hereafter be put upon the amendment, the section today provides notice of a Congressional purpose to exclude which was absent from it when petitioner came to this country and during the years he lived here prior to the commencement of deportation proceedings against him.

b.

Petitioner has contended that as administered by respondent the statute is unconstitutionally vague and has deprived him of notice and due process. This was true as of the time of his entry and of the time he has been resident here.[16]

Respondent urges (Res. Br., p. 46) that on his entry here, petitioner was bound by the statute as it had been construed and therefore this was notice to him. The fact of the matter is that there was nothing to apprise petitioner when he voluntarily took up his residence here that past homosexual acts made him excludable and that future ones would make him deportable.

Clearly, the statute made no mention of it; the visa application which listed all other grounds for exclusion

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[16] In urging that the court will look to authoritative sources for interpretation that will save a statute from the charge of vagueness, respondent refers to cases where the meaning of a state statute has been construed by its own courts. (Res. Br., p. 47). In *Giaccio v. Pennsylvania*, 382 U.S. 399, this court unanimously held at the last term of court that the state statute was still vague after the state court interpretations attempting to uphold its validity, saying: "We hold that the . . . Act is constitutionally invalid both as written and as explained by the Pennsylvania courts". (p. 405). Similarly here, the departmental and court decisions supplied no guide lines or standards nor could they, thus leaving the statute as administered vague and uncertain.

did not mention it: (Appendix A, Pet.'s Br.).[17] Nor can it be claimed that he should have known that the statute was construed to exclude persons who had engaged in homosexual conduct because the cases cited by respondent[18] as so holding were decided after his entry in 1955. (*Quiroz v. Neelly*, 291 F.2d 906 in 1961); *U.S. v. Flores Rodriguez*, 237 F.2d 405, in 1956); *Ganduxe y Marini v. Murff*, 183 F. Supp. 565, in 1959). To impute to him now knowledge at the time of his entry of something which may have come into being long after is violative of every instinct of justice and fairness. And to infer thus that petitioner is not prejudiced by respondent's construction and application to him of the section is preposterous. Had petitioner been apprised by the statute or by the State Department's visa application that his 15 to 20 homosexual experiences between the ages of 16 and 21 prior to admission to the United States would classify him — without medical proof — as pathologic or mentally affected, and that those experiences would forever menace him, subjecting him to deportation, is it likely that he would have uprooted himself from Canada and established his home and livelihood in this country upon so precarious a residence! Indeed, the damage and hurt to petitioner by deportation today is so grave that in the circumstances of this case, it is a denial of due process.

c.

As has been pointed out several times, respondent is very agile in jumping from behavior to condition to suit its argument. Thus, in urging that the vagueness doctrine is not applicable to petitioner, it states:

> "It is not a device to enable an individual afflicted with a condition that if discovered would have barred his admission to this country so to conduct himself as to avoid making his condition known to the administrative authorities." (Res. Br. p. 42)

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[17] Res. Br., p. 48, note 31.

[18] Res. Br., p. 19, note 9.

Now, respondent cannot have it both ways. It is precisely the lack of any proof of a condition in the petitioner either prior to entry or post-entry which he has urged throughout. But respondent has said we are not concerned about his condition, we know how he has behaved and that is sufficient. The point that petitioner has made is that if his condition was involved, that could not be hidden, but if behavior was involved, that could be controlled by him since he does not suffer from a pathologic condition.[19]

If respondent applied the statute to petitioner as he contends it reads, namely, as to whether he is "afflicted with a psychopathic personality", that would be addressed to his condition and as to that respondent has offered no proof and so admits.[20] Since respondent, however, has administered the statute as applying only to his behavior, the failure of the statute so construed to advise him that subsequent behavior would be used to expel him from this country, denied him the opportunity to knowingly refrain from certain conduct. This is not to hide a condition — the petitioner has concealed nothing — but to regulate behavior, if the impact of the statute demand it.

But, respondent argues, even if the statute aims at post-entry conduct, Congress can enact legislation after an alien's arrival that makes him deportable, so why the hue and cry because the statute is defined retroactively to make him deportable. The essential point is that while Congress can, Congress hasn't. Even when in 1965, it amended Section 212(a)(4) by adding the term "or sexual deviation" to "resolve any doubt",[21] it did not enact legislation to make post-entry sexual deviation a ground for deportation. Yet the net effect of re-

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[19] R. pgs. 12-16; statements of Dr. Falsey and Dr. Ullman.

[20] Res. Br., p. 19.

[21] S. Rep. No. 748, 89th Cong., 1st Sess., pp. 18-19.

spondent's order with respect to this petitioner is to deport him for something which neither statute nor interpretation could have given him notice of at the time of his entry nor thereafter.

Respondent further contends that since Congress could explicitly make conduct deportable retroactively, it could *implicitly* make future conduct deportable. Petitioner suggests first that Congress has not made sexual conduct after entry deportable, and secondly, respondent does not point to a single instance where deportation has been based upon a ground that was implicit and not expressed in specific language.

This court in *Jordan v. De George*, 341 U.S. 223, held that aliens are entitled to protection under the due process clause against a lack of fair warning that conduct of a kind may render them deportable. While the purpose of the present statute is not to regulate conduct, as respondent correctly states (p. 46), when resort is made to future conduct as it has been in this case because of the administrative interpretation of the statute, the petitioner was entitled to adequate notice. As Justice Jackson said in his dissent in the *Jordan* case,

> "A resident alien is entitled to due process of law. We have said that deportation is equivalent to banishment or exile. . . . This is a savage penalty and we believe due process of law requires standards for imposing it as definite and certain as those for conviction of crime." (p. 243)

Respondent argues that the *Jordan* case was decided before *Harisiades v. Shaughnessy*, 342 U.S. 580 and *Galvan v. Press*, 347 U.S. 522, which cases re-affirmed Congress' power to make post-entry conduct deportable and since the constitutional protection against ex post facto laws was held not available to aliens, no other constitutional protection should be available to them.

This is indeed faulty reasoning to say nothing of the brutal philosophy behind it. This court, very reluctantly

and because of a long established tradition[22] upheld the power of Congress to legislate *ex post facto* in the area of deportation. But in numerous cases since then, this court has made clear that within the ambit of the power of Congress to legislate, the alien should be accorded every other protection, including limiting the meaning of the language used most strictly. The *ex post facto* laws are related to the constitutional power of Congress to act; due process and other constitutional guarantees are protections against abuse of power under the guise of such legislation. The court thus followed *Galvan* with *Rowoldt v. Perfetto*, 355 U.S. 115 (1957). Here the drastic harshness of deportation for membership in or affiliation with (*ex post facto*) proscribed organizations was lessened by this court's construction of the term membership to mean a knowing and meaningful association with the barred organization. (Id. 120). *Rowoldt* was affirmed and reinforced in *Gastelum-Quinones v. Kennedy*, 374 U.S. 469 (1963) by the court's ruling that the required meaningful membership in proscribed organizations may not be inferred by the alien's silence. (Id. 479). And in the most recent case, *Sherman v. I.N.S.*, 385 U.S. 276 (1966), the court held that deportation being a forfeiture of residence, "no deportation order may be entered unless it is found by clear, unequivocal and convincing evidence that the facts alleged as grounds for deportation are true." (Id. 286). See also *Costello v. I.N.S.*, 355 U.S. 115 (1957) where contending interpretations of the relevant deportation provision were both possible, the court adopted the one that avoided deportation, distinguishing the case from the earlier adverse decision in *Eichenlaub v. Shaughnessy*, 338 U.S. 521 (1950).

The foregoing cases well justify the expectation that the constitutional safe-guard against *ex post facto* laws

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[22] *Galvan v. Press*, 347 U.S. 682.

which has been withheld from non-citizens is not necessarily dispositive of all future holdings to be made by the court. In *Galvan v. Press, supra,* (p. 530) Mr. Justice Frankfurter, in writing for the court, said:

> "In light of the expansion of the concept of due process as a limitation upon all powers of Congress, even the war power, see Hamilton v. Kentucky Distilleries Co., 251 U.S. 146, 155, much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. And since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the *ex post facto* Clause, even though applicable only to punitive legislation, should be applied to deportation.
>
> "But the slate is not clean . . ."

We would hope that on revisit by the court, advanced judicial thinking will find a way to "clean the slate" so that our canon of fairness and justness would apply alike to all persons dwelling here under our constitution, be they citizens or foreign-born.

In any event, whatever the rulings with respect to *ex post facto* laws, it can be no reason to deprive non-citizen of the established right to due process of law, which is the issue before this court.

POINT IV

The Failure To Prove Deportability

Petitioner is not urging that the procedures prescribed by statute for exclusion proceedings are necessarily applicable to a deportation proceeding. What petitioner is saying is that when the deportation charge is that the alien was excludable at time of entry, the *proof* that he was excludable can be no less in the deportation case than it

would have been in the exclusion proceeding.[23] But in this Alice in Wonderland situation that respondent's application of the relevant statute has brought petitioner, the respondent protests that in the deportation proceeding "the government, not the alien, bears the burden of proof" (Res. Br., p. 54) and blandly argues that this has been met on a record that admittedly would not sustain an exclusion, where the government does not have the burden of proof. The absence of a medical examination by the Public Health Service is considered immaterial since it treats the Congressional requirement therefor as a nullity and immaterial in determining whether the alien was "afflicted with a particular condition", although that is the very issue in the case. (Res. Br., p. 51, note 32.)

[23] Indeed, in the light of this court's holding in Woodby v. Immigration and Naturalization Service, during the current term, the proof must be much more substantial.

CONCLUSION

Counsel for petitioner feel in concluding this brief that they should not refrain from suggesting that this case presents an inherent question of ultimate morality which ought not to be by-passed. In the light of modern scientific investigation, making private, consensual homosexual practices between adults the subject of oppressive legislation and ostracism, is reminiscent of history's other witchhunts. To the extent that the statute involved here applies sanctions to persons labeled "homosexuals" the forthright testimony of distinguished professors of medicine, sociology, anthropology and other sciences presented in the *amicus* brief of the Homosexual Law Reform Society, submitted on this argument, plainly shows that it is factually wrong, socially wasteful and morally inexcusable.

The order of deportation should be set aside.

Respectfully submitted,

BLANCH FREEDMAN
ROBERT BROWN

Attorneys for Petitioner

On the Brief
David M. Freedman
Blanch Freedman